IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.4472 OF 2004

Manoj Sharma and Anr. ...Applicants

V/s.

The State of Maharashtra ...Respondent

Shri. S.V.Kotwal for the Applicants.
Shri. A.S. Gadkari A.P.P. for the Respondent.

AND

CRIMINAL APPLICATION NO.4988 OF 2004

Sambhaji Dattatraya Pote ...Applicant

V/s.

The State of Maharashtra ...Respondent

Shri. S.R.Pasbola for the Applicant.
Shri. A.S.Gadkari A.P.P. for the Respondent.

CORAM: A.S. OKA, J.
DATED: JUNE 13, 2005.

P.C.:

1. As both the Applications arise out of the same offence, same can be disposed of conveniently by a common order.

2. The Criminal Application No.4472 of 2004 is filed by the Accused Nos.2 and 10 in C.R.No.289 of 2003 which was registered at Swargate Police Station for the offences under sections 147, 148, 149, 302, 120-B r/w Section 109 of the Indian Penal Code, Section 37

of the Bombay Police Act, 1951 and Sections 4 and 25 of the Arms Act. The Criminal Application No.4988 of 2004 is filed by the Accused No.5.

3. The provisions of the Maharashtra Control of Organised Crime Act,1999 (hereinafter referred to as the 'MCOC' Act) were applied to the case. The chargesheet was filed alongwith sanction under section 23 of the MCOC Act.

4. The case of the prosecution is that one Satish Misal was murdered by some assailants when he was travelling in a car. It is alleged that members of Chota Rajan Gang were involved in said murder. The crimes to which these applications relate is registered in connection with the murder of one Mahendra @ Bablu Kavedia. The Accused No.11 Deepak Misal in this case is the brother of the deceased Satish Misal and allegation is that the Applicants are the employees of the the said Deepak Misal. It is stated that the said Satish Misal and said Kavedia were partners and were carrying on business as contractors. It is stated that they had long business association. It is alleged that the said Deepak Misal believed that the said Kavedia had ditched his brother Satish Misal.

5. The Additional Commissioner of Police granted the sanction to investigate the offence under section 3 of the MCOC Act. On 16th October, 2003 a confessional statement of one Gajanan Marne, a co-accused was recorded in which he allegedly named Deepak Misal and others including the Applicants. After the confessional statement of said Gajanan Marne was recorded, on 24th October, 2003, the Commissioner of Police passed the order of sanction under section 23(2) of the MCOC Act.

6. The Applicant No.1 in the Application No.4472 of 2004 was arrested on 29th August, 2003 and the Applicant No.2 herein was arrested on 29th September, 2003. In so far as the Applicant in other application namely 4988 of 2004 is concerned, he was arrested on 2nd September, 2003. The Applications were made by the Applicants before the learned Special Judge for grant of bail and the said Applications have been rejected.

7. The learned counsel for the Applicants in the Application No.4472 of 2004 has placed reliance on the Judgment and Order dated 11th February, 2005 passed by this Court in Criminal Application No.4400 of 2005 by

which co-accused namely Deepak Dhondiba Misal who is Accused No.11 was ordered to be enlarged on bail. The learned Counsel has taken me through the alleged confessional statement of Gajanan Marne which is relied upon by the prosecution. He submitted that there is no material on record save and except the said confessional statement, as against the Applicant No.2. He pointed out that in so as far the Applicant No.1 Manoj is concerned, apart from the said confessional statement, the material available is alleged recovery of a sword at his instance. He pointed out various contradictions in the statement of the Applicant No.1 recorded for the purposes of recovery and the contents of the memorandum panchnama. He pointed out that statement of the co-accused Rupesh Marne was recorded between 15.30 p.m., to 15.45 p.m., which records that axe belonging to him and sword belonging to the Applicant No.1 are kept on ceiling of house of one Chaudhary which was close to his residence. The statement of the Applicant No.1 was recorded between 15.50 p.m., to 16.05 p.m. regarding recovery of the sword at his instance and the said statement also discloses the fact that the weapon used by the co-accused Marne is kept at the same place,i.e. on the ceiling of house of Mr. Chaudhary. He pointed out that panchnama regarding recovery of weapon at the

instance of the co-accused Rupesh Marne is recorded from 15.45 p.m. to 17.45 p.m. He pointed out that the said panchnama does not record that the sword was found on the ceiling of the said house. He relied upon the other panchnama which records recovery of sword at the instance of the Applicant No.1. He pointed out that the panchnama notes that the work of recording panchnama was started at 16.05 p.m. and was completed at 17.45 p.m. He submitted that it is surprising that when another weapon was recovered from the same place at 15.45 p.m., the sword is not found at the same place and it is case of the prosecution that sword was recovered at the instance of the Applicant No.1 Manoj at 16.05 p.m.from the same place. He placed reliance on decision of the Apex Court in the case of RANJITSING BRAHMAJEETSING SHARMA Vs. STATE OF MAHARASHTRA AND ANOTHER reported in 2005 SCCL.COM 261 and submitted that the finding recorded by the Court as required by Section 21(4) of the MCOC Act will have to be tentative in nature.

8. Learned counsel lastly submitted that as there was no material against the Applicant No.2 save and except the confessional statement referred to above, the Applicant No.2 is entitled to be enlarged on bail as held by this Court in the case of accused Deepak. He

submitted that the evidence of recovery of sword against the Applicant No.1 will have to be ignored and therefore, only material which remains available against him is the confessional statement. He, therefore, submitted that the Applicants are entitled to claim parity on the basis of order dated 11th February, 2005 passed in the case of Deepak Misal.

9. The Applicant in Criminal Application No.4788 of 2004 has adopted the submissions of the counsel appearing for the Applicant in first Application and has submitted that against the said Applicant there is no material save and except the confessional statement referred to above and, therefore, he is also entitled to be enlarged on bail on the ground of parity.

10. Shri. Gadkari, learned A.P.P. has strongly opposed the Applications. He has, however, not disputed that from the record it appears that except for the confessional statement there is no material against the Applicant No.2 in Application No.4472 of 2004 and the Applicant in Criminal Application No.4988 of 2004. He fairly pointed out that Judgment and Order passed by this Court dated 11th February, 2005 in the Criminal Application filed by Deepak is not challenged by the State. He pointed out that there is

a clear evidence of recovery of sword against the Applicant No.1 in the first application. He submitted that assuming that there are some discrepancies as regards recovery, the same are minor in nature and in any event whether the said recovery can be the basis for conviction or not has to be decided at the stage of final hearing when the evidence is recorded.

11. He submitted that the complicity of all the Applicants is very apparent on the basis of the confessional statement which is relied upon by the State. He submitted that once it is found that there was some material against the Applicants, in view of stringent provision Section 21(4) of the MCOC Act, the Applicants cannot be enlarged on bail.

12. I have considered the rival submissions. In so far as the Applicant NO.2 in the Application No.4472 of 2004 and the Applicant in Criminal Application No.4988 of 2004 are concerned the admitted position is that except the confessional statement of co-accused Shri. Gajanan Pandharinath Marne, there is no any other material on record. Perusal of the said statement discloses that the said Marne has named all the accused therein. From the said statement it appears that the accused Deepak @ Baba Misal is the

brain behind the offence and the said Gajanan Marne and other accused had acted at the instance of said Deepak Misal. The confessional statement shows that the Applicant No.1 in Application No.4472 of 2004 has actually participated in the assault. As far as the role played by the Applicant No.2 is concerned, it appears that the allegation against him is that he showed the deceased to the other accused. In so far as the Applicant in other application is concerned, he stated that the Applicant was present at the site of the offence.

13. It will be necessary to refer to the decision of this Court dated 11th February, 2005 in case of bail application of Deepak Misal. After noting the requirements of the Section 21 of the MCOC Act, the learned Judge has held that :

> So far as present case is concerned, the only evidence against the present applicant is in the form confession of co-accused Gajanan Marne. Apart from this evidence, there is no other evidence directly connecting the present applicant. In view of these facts, in my view, prima facie there is no material to show that the applicant is involved as member of organised crime syndicate operating continuously in unlawful activity through organised crime syndicate and, therefore, does not fall within the definition of section 2(1)(d)(e) of the Act. I am satisfied that prima facie, there are no reasonable grounds for coming to the conclusion that

> he is guilty of the offences punishable under this Act.

14. Thus, the view taken by this Court in case of the co-accused is that when the only evidence against him is in the form of confession of co-accused, there were no reasonable grounds for coming to the conclusion that the accused was guilty of the offences punishable under MCOC Act. The learned Judge also noted that there was no offence pending against the Applicant Deepak before him and none of the offences with which he was involved indicate that he was a member of organised crime syndicate as envisaged in section 21(1)(d) and (e) of MCOC Act.

15. In the present case, it is not in disputed that there are no criminal antecedents in case of all the three Applicants. Thus, the case of the Applicant No.2 in Criminal Application No.4472 of 2004 and the case of Applicant in Application No.4988 of 2004 is on par with the case of the co-accused Deepak Misal who was ordered to be enlarged on bail on 11th February 2005. In case of said Deepak, this Court held that there was no offence alleged against the said Deepak indicating that he was member of organised crime syndicate as the evidence against him was only in the form of confession of co-accused. As there was no

material against the said co-accused Deepak save and except the confessional statement of Gajanan, this Court recorded satisfaction that there was no reasonable ground for coming to the conclusion that said Applicant was guilty of the offences punishable under the MCOC Act. In my view, therefore, there is no reason why the Applicant No.2 in Application No.4472 of 2004 and the Applicant in Application No.4488 of 2004 should not be enlarged on bail on same terms and conditions on which said Deepak was ordered to be enlarged on bail by this Court. There are no criminal antecedents of the Applicants brought on record and there is nothing on record to show that they are likely to commit any offence while on bail.

16. In so far as the Applicant No.1 is concerned, the material against him, apart from the confessional statement of Gajanan Marne, is recovery of a sword. It will be necessary to refer to the affidavit in reply filed to this Application. In paragraph No.6 of the said affidavit it is stated that the blood stains found on the sword are tallying with the blood found on the clothes and body of the deceased.

17. Submission of the learned Counsel for the Applicants in short is that due to discrepancies which

are reflected from the record, the recovery of the weapon is doubtful. At this stage what is to be seen is whether there is any material on record against the Applicant which can form part of the evidence. Whether recovery is proved or not is a matter for evidence. In view of availability of said material it is very difficult to record satisfaction that there are reasonable grounds for believing that the Applicant No.1 is not guilty of the offence alleged against him. Thus, no case is made out in so far as the Applicant No.1 is concerned.

18. Hence, I pass the following order:

: O R D E R :

i) Criminal Application No.4472 of 2004 is dismissed so far as the Applicant No.1 Manoj Mangilal Sharma is concerned.

ii) The Applicant No.2 Prashant Bhosale in Criminal Application No.4472 of 2004 shall be enlarged on bail in the sum of Rs.25,000/- with one or two local sureties in the like amount and the Applicant shall surrender his passport to the police and he shall not enter the limits of cities of Pune and Chinchwad

except for attending the trial. The said Applicant shall be released on bail only after giving his new address to the Superintendent of Jail and shall report to the nearest Police Station from the new address twice in month. It is made clear that notwithstanding this condition the Applicant will be permitted to enter city of Pune and Chinchwad for attending the trial in connection with the case.

iii) Criminal Application No. 4988 of 2004 is allowed and the Applicant shall be enlarged on bail in the sum of Rs.25,000/- with one or two local sureties in the like amount and the Applicant shall surrender his passport to the police and he shall not enter the limits of cities of Pune and Chinchwad except for attending the trial. The said Applicant shall be released on bail only after giving his new address to the Superintendent of Jail and shall report to the nearest police station from the new address twice in month. It is made clear notwithstanding aforesaid condition, the Applicant will be permitted to enter city of Pune and Chinchwad for attending the trial in connection with the case.

iv) Parties to act upon an authenticated copy of this order.

JUDGE